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No. 85-592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATURAL GAS PIPELINE COMPANY OF AMERICA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CORRECTED COPY

***PAUL E. GOLDSTEIN**
PAUL W. MALLORY
EMMITT C. HOUSE
MidCon Corp.
701 East 22nd Street
Lombard, Illinois 60148
(312) 691-2731
Attorneys for Natural Gas Pipeline Company of America

JOSEPH M. WELLS
Of Counsel

*Counsel of Record

October 3, 1985

Merrill/Chicago • 372-2800

QUESTION PRESENTED

Whether, in a proceeding under Section 4 of the Natural Gas Act involving a proposed increase in resale rates of Natural Gas Pipeline Company of America, the Federal Energy Regulatory Commission acted improperly in denying the recovery in rates of amounts expended by the company in failed natural gas supply projects, thereby disregarding the financial integrity of the company and inconsistently administering the applicable statute.

LIST OF PARTIES

Public Agencies
Federal Energy Regulatory Commission

Interstate Natural Gas Pipeline Companies
Natural Gas Pipeline Company of America

List of Petitioner's Parents, Subsidiaries, and Affiliates Pursuant to Rule 28.1
Natural Gas Pipeline Company of America is a subsidiary of MidCon Corp.
MidCon Corp. is the parent of the following subsidiaries:

Alabama Gulf South Pipeline Company, Inc.
Alabama Methane Production Company
Anthrust, Inc.
Cotton Petroleum Corporation
Exeter Capital Corporation
Exeter Drilling Company
Exeter Exploration Company
Exeter Service Company
Gulf South Pipeline Company
Harper Oil Company
Lynx Drilling Company
MCN Acadian Gas Pipeline Corp.
MCN Bayou Interstate Pipeline Corp.
MCN Calcasieu Gas Gathering Corp.
MCN Coal Gasification Company
MCN Equities, Inc.
MCN Louisiana Industrial Gas
MCN Overseas Inc.
MCN Pelican Interstate Gas Corp.
MCN Pelican Transmission Corp.
MCN Pontchartrain Natural Gas Corp.
MCN Research, Inc.
MCN Spindletop Gas Distribution Corp.
MCN Technologies, Inc.
MCN Transmission, Inc.
MCN Utah Pipeline Corp.
MCN-TEX Corp.
MCN-Trinidad and Tobago LNG Company
MidCon Arkansas Pipeline Corp.
MidCon Colorado Pipeline Corp.

MidCon Acquisition Corp.
MidCon Enterprises, Inc.
MidCon Exploration Company
MidCon Gas Products, Inc.
MidCon General, Inc.
MidCon Holding Corp.
MidCon Hydrocarbons Corp.
MidCon Illinois Pipeline Corp.
MidCon International N.V.
MidCon Louisiana Pipeline Corp.
MidCon Michigan Pipeline Corp.
MidCon Mississippi Natural Gas Pipeline Corp.
MidCon Missouri Pipeline Corp.
MidCon New Mexico Pipeline Corp.
MidCon Oklahoma Natural Gas Pipeline Corp.
MidCon Plants, Inc.
MidCon Razorback Pipeline Corp.
MidCon Sales Inc.
MidCon Texas Pipeline Corp.
MidCon Ventures, Inc.
MidCon Wyoming Pipeline Corp.
MidOk Pipeline Company
MidTex Pipeline Company
MidCon Nebraska Pipeline Corp.
Mississippi Gulf South Transmission Company
Mississippi River Transmission Corporation
NAERCO, Inc.
NGP-LNG, Inc.
Petrounited, Inc.
South Gulf Management, Inc.
TPC Pipeline Company
Texas Gulf South Pipeline Company
Texoma Production Company
Troy Potter Inc.
UER Gas Trading, Inc.
UER Marketing Company
UER Overseas Finance, N.V.
UER Services, Inc.
United Energy Resources, Inc.
United Energy Services Company
United Gas Pipe Line Company
United Texas Transmission Company
Western Energy Transport Company

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NATURAL GAS PIPELINE COMPANY OF AMERICA

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Natural Gas Pipeline Company of America (Natural) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 5, 1985, in *Natural Gas Pipeline Company of America* v. *Federal Energy Regulatory Commission*, No. 84-1351.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 765 F.2d 1155 (1985). No petition for rehearing was filed with the Court of Appeals. The court below affirmed an opinion and order of the Federal Energy Regulatory Commission (Commission) styled Opinion No. 218, issued on May 7, 1984 (*FERC Opinion*), 27 FERC ¶61,201, which is reproduced at App. 39a-54a. The *FERC Opinion* affirmed in part and modified in part an initial decision of an Administrative Law Judge (ALJ) issued on December 20, 1979, 9 FERC ¶63,059 (*Initial Decision*), which is reproduced at App. 55a-81a. In Opinion No. 218-A issued July 5, 1984, 28 FERC ¶61,020 (1984) (*Rehearing Order*), the Commission denied Natural's

application for rehearing. That opinion is reproduced at App. 37a-38a[1].

JURISDICTION

1. The Court of Appeals affirmed a Commission order requiring Natural to exclude from its cost of service amounts attributable to prudently incurred expenses, contrary to Sections 4 and 5 of the Natural Gas Act (Act), 15 U.S.C. §§717c and 717d. The Commission had jurisdiction to review Natural's rates pursuant to Sections 4 and 5 of the Act. Natural sought court review pursuant to Section 19(b) of the Act, 15 U.S.C. §717r(b).

2. The Court of Appeals entered judgment on July 5, 1985. App. 7a.

3. The jurisdiction of this Court is invoked under 28 U.S.C. ¶1254(l), and Section 19(b) of the Act, 15 U.S.C. ¶717r(b).

STATUTORY PROVISIONS

The pertinent portion of Section 4(e) of the Act, 15 U.S.C. §717c(e), reads as follows:

> (e) Whenever any . . . new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and . . . after full hearings, either completed before or after the

1. Petitioner has filed a separate Appendix which contains all opinions in this matter, including the judgment below. Hereinafter the Appendix will be referred to as "App.", followed by the appropriate page number.

> rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective.[2]

The pertinent portion of Section 5(a) of the Act, 15 U.S.C. §717d(a), reads as follows:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.[3]

STATEMENT OF THE CASE

This case involves review of a decision of the U.S. Court of Appeals for the District of Columbia Circuit affirming orders of the Commission denying Natural the recovery of certain abandoned project costs from its ratepayers.

A. Factual Background

Natural is an interstate gas pipeline company with a 12,000 mile long transmission system which transports natural gas from the Gulf Coast and Southwest producing areas to numerous utility and municipal customers in the Midwest.

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2. The full text of Section 4(e) is reproduced at App. 1a-2a.

3. The full text of Section 5(a) is reproduced at App. 2a.

Natural is a natural gas company subject to the Commission's rate jurisdiction under Section 4(e) of the Act, 15 U.S.C. §717(e). This case arises out of a general rate increase proposal filed by Natural on June 30, 1978 with the Commission. On July 28, 1978, the Commission suspended Natural's proposed rate increase for the full statutory five month period, permitting the rate increase to become effective, subject to refund and the outcome of a hearing. 4 FERC ¶61,089 (1978).

Natural was able to resolve most of the issues in the case under a settlement agreement which was approved by the Commission. 9 FERC ¶62,005 (1979). Several issues involving costs associated with tax normalization, amortization of unsuccessful and abandoned nontraditional gas supply projects and separation of liquid hydrocarbons remained unresolved by the settlement agreement. The tax normalization issue was consolidated with another proceeding for separate hearing and decision. Following an evidentiary hearing before the ALJ, the *Initial Decision* was issued on the abandoned projects and liquids separation issues. The liquids separation issue was subsequently resolved by a settlement agreement. Thus, the only issue remaining to be decided in this proceeding involves the abandoned gas supply projects.

Natural has not proposed to include the costs of the abandoned projects in its rate base and thereby earn a return of and a return on its investment. It has only sought to recover its out of pocket investment. It has sought to do so by proposing to amortize over a five year period approximately $13 million dollars in costs incurred for three nontraditional gas supply projects: (1) certain environmental costs associated with a coal gasification project in Dunn County, North Dakota (Dunn County Project); (2) costs incurred in Kalingas, a liquefied natural gas (LNG) project in Iran (Kalingas Project); and (3) costs associated with the Gas Arctic Project, an effort to transport gas from the Prudhoe Bay area of Alaska and from Canada to the lower 48 states (Gas Arctic Project). Natural proposed to amortize approximately $1.5 million of the Dunn County Project costs, $4.7 million of the

Kalingas Project costs and $6.7 million of the Gas Arctic Project costs.

The abandoned gas supply projects arose during the 1970s, a period of severe gas shortage experienced by Natural and other natural gas pipelines and consumers. The curtailments to customers resulting from the supply shortage led Natural to seek new sources of gas supplies. In pursuit thereof, Natural participated in a number of nontraditional projects, including advance payments to producers and the abandoned projects at issue in this case.

Traditionally, as an interstate pipeline, Natural was able to rely upon producers to explore for and to develop new gas supplies. The scarcity of supplies and severe curtailment of the early 1970s, however, prompted Natural to conclude that it could no longer rely upon producers alone to develop enough gas for the future needs of its customers. The three nontraditional gas supply projects at issue in this case presented Natural with an opportunity to obtain significant gas supplies in the future, during a time when the deliverability of Natural's traditional gas supplies was insufficient and expected to continue to decline. The facts with respect to Natural's expenditures and its participation in each of the three projects are as follows:

Gas Arctic Project

From 1971 through 1977, in an effort to obtain certificate authorization to transport gas from the Prudhoe Bay area of Alaska and Canada to the lower 48 United States, Natural participated as a member of the Gas Arctic Northwest Project Study Group (Study Group). During that period, Natural had a contract with Imperial Oil Company for gas reserves in the MacKenzie River Valley of the Northwest Territory of Canada and a funding arrangement with Exxon for 20% of its gas production from the Prudhoe Bay Field on the North Slope of Alaska. Natural and the other members of the Study Group funded research for economic, legal, environmental, and engineering studies to determine the feasibility of transporting

Alaskan and Canadian gas via a pipeline through a designated route to the U.S. and Canadian markets. The studies were required to be presented as part of the record in certificate proceedings before the Commission at consolidated Docket Nos. CP75-96, *et al.*

While a different project for the transportation of Arctic gas was ultimately approved by the Commission, the studies prepared by Natural and the Study Group contributed significantly to the Commission's ability to make an informed judgment of the feasibility of the project ultimately authorized. *Initial Decision*, 9 FERC, at p. 65,226-27; App. 70a.

Dunn County Project

Natural was planning to construct a coal gasification facility in Dunn County, North Dakota which would initially produce 250 MMcf of gas per day. In 1973, Natural acquired certain coal leases and an option to purchase property in North Dakota necessary for the Dunn County Project. Natural engaged consultants to prepare the basic studies of the coal gasification process and the other areas required to develop environmental reports required by state and federal regulatory authorities.

The Dunn County project met insuperable regulatory barriers. The North Dakota Water Commission voted to deny Natural's application for a state water permit. Subsequent to completion of Natural's environmental report, two major federal environmental statutes were enacted by Congress. Many new regulations were adopted by federal and state agencies pursuant to the provisions of the new federal statutes, making portions of the previously completed environmental studies outdated and inapplicable. In addition, Natural was unable to finance the project. Therefore, Natural's Dunn County Project activities were suspended and it is unlikely that the project could be completed.

Kalingas Project

In late 1975, Chicago Bridge and Iron Company (CBI) offered Natural an opportunity to participate as an interest owner in the Kalingas Project—a consortium of companies organized to export LNG from Iran for deliveries commencing as early as 1982. At that time, Kalingas offered the only available source of LNG to Natural for deliveries as soon as the early 1980's. Natural and CBI entered into an agreement requiring the payment by Natural to CBI of $4.5 million which gave Natural a future right to buy a 5% interest in Kalingas. Natural was required to enter into this agreement in order to preserve its right to purchase gas at a later date. A 5% interest in Kalingas would have given Natural the right to purchase 400 MMcf per day of LNG production from Kalingas, adding approximately 2400 Bcf of gas reserves to Natural's gas supply, assuming deliveries over a twenty year period. Natural pursued the Kalingas Project because it offered Natural the opportunity to secure a long term gas supply backed by substantial reserves with deliveries commencing by about 1982. The gas supply for the Kalingas project was to be produced from a field in offshore Iran.

By 1977, it became apparent that implementation of the Kalingas project would have required participation by Natural of much more than 5%, and probably not less than a 15% interest. Natural was unable and unwilling to undertake to commit to such a large percentage ownership. Accordingly, Natural declined to exercise its right to purchase 5% of Kalingas and consequently, forfeited its previous payment of $4.3 million to CBI. Subsequently, the Kalingas project was restructured. While the restructured project appeared to be economically feasible, if physical implementation of the project could have been undertaken by a date certain, any delays beyond that date certain would result in severe cost escalations. In 1977, at the time that Natural was required to decide whether to make a firm commitment to purchase LNG from

the restructured Kalingas project, the viability of other potential LNG sources, notably Trinidad and Nigeria, began emerging. The opportunity to secure an LNG supply from one or both of those sources, together with the likelihood of severe escalations in the restructured Kalingas project, led Natural to decline to participate further in the Kalingas Project.

B. Proceedings Below

In the *Initial Decision*, the ALJ allowed Natural recovery of the Dunn County Project costs on the grounds that the Commission's determinations in the Great Plains Coal Gasification proceedings, decided in *Great Plains Coal Gasification Associates*, 9 FERC ¶61,221 (1979), *rev'd and remanded sub nom Office of Consumer's Cousel* v. *FERC*, 655 F. 2d 1132 (D.C. Cir. 1980) (*Great Plains*), permitted it. *Initial Decision*, 9 FERC at p. 65,230; App. 79a-80a. The ALJ disallowed most of the Kalingas Project costs because be believed they were foreign advance payments which were not recoverable under applicable Commission precedent. The ALJ did, however, permit Natural the recovery of a small amount of administrative expenses of the Kalingas Project because he considered them "routine" administrative costs. *Intital Decision*, 9 FERC at p. 65,226; App. 69a. The ALJ did not allow Natural recovery of Arctic Gas Project costs because he believed that the recovery of those costs should be addressed in a rulemaking proceeding to ensure a uniform result among the numerous pipelines which could make claims for such costs. *Initial Decision*, 9 FERC at p. 65,227; App. 72a-74a.

In the *FERC Opinion*, the Commission disallowed Natural recovery of all costs of the three abandoned projects. With respect to the disallowance of Dunn County Project costs, the Commission stated that it was precluded from permitting such costs by the *Great Plains* case and that the instant decision was consistent with its policy of denying recovery of potentially nonjurisdictional synthetic natural gas costs. Similarly, the Commission found that all of the Kalingas Project costs should be disallowed because the project would have

produced gas which would not necessarily have been within the jurisdiction of the Commission to regulate. The Commission stated that both the Kalingas and Dunn County projects were highly speculative, with any benefits to consumers remote and uncertain. The Commission therefore concluded that the costs associated with those projects were properly borne by the shareholders of Natural, rather than the ratepayers.

As to the Gas Arctic Project costs, the Commission noted that it had issued two decisions in individual pipeline rate cases disallowing the recovery of similar costs. The Commission therefore concluded that the same result should obtain for Natural's Gas Arctic Project costs.

With respect to any inconsistency between the Act and the Federal Power Act, the Commission stated that differences in its certificate authority under the two statutes justifies any difference in treatment accorded unsuccessful gas and electric projects. The Commission similarly dismissed arguments that its disallowance of Natural's abandoned project costs was inconsistent with its determination involving abandoned gas storage costs and producer dry hole costs.

Generally, the Commission concluded that the abandoned project costs must be disallowed because the projects were considered "speculative and uncertain, remote in time, and without benefit to ratepayers." In the *Rehearing Order*, the Commission affirmed its determination in the *FERC Opinion* without modification.

REASONS FOR GRANTING PETITION

The Court of Appeals' affirmance of the Commission's ruling that Natural is not entitled to recover the costs of the abandoned projects in its rates not only is erroneous, as is shown below, but presents questions of major importance warranting review by this Court. The issue transcends this particular case and will likely continue to be presented to this

Court in the future because of other existing controversies[4] and future gas supply exigencies. The issue is of signal importance to the natural gas industry because it involves the Commission's responsibility with respect to the financial integrity of pipelines which act in a prudent fashion to supplement gas supplies during periods of severe shortage. One of the major responsibilities of the Commission under the Act is to assure an adequate gas supply for the ultimate consumers. *See e.g.*, *F.P.C.* v. *Texaco, Inc.*, 417 U.S. 380, 388 (1974); *Permian Basin Area Cases*, 390 U.S. 747, 795-99 (1968); *Public Service Commission* v. *F.P.C.*, 467 F. 2d 361, 368-69 (D.C. Cir. 1972). The abandoned projects at issue were intended to increase the total gas supply available to Natural's customers, thereby contributing to the fulfillment of gas requirements which were going unfulfilled in a period of severe shortage. The holding below drastically undercuts the incentive of pipelines to meet gas service obligations when faced with shortages from traditional gas supply sources.

1. The Court of Appeals Erred in Affirming the Commission's Determination That the Abandoned Project Costs Should Be Treated Differently Than Similar Costs the Commission Allows Utilities to Recover.

The Commission is obliged to act in a manner that is consistent and even-handed in dealing with similar issues on different pipeline systems and the Court of Appeals has consistently required the Commission to do so in the past. *Michigan Wisconsin Pipe Line Co.* v. *F.P.C.*, 520 F. 2d 84, 89 (D.C. Cir. 1975); *American Public Gas Assn.* v. *F.P.C.*, 546 F. 2d 983, 988 (D.C. Cir. 1976). Yet, in this case, the Court of Appeals, on the basis of assertions wholly unsupported by the

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4. There are currently several cases at various stages of litigation in which the recovery of abandoned project costs in pipeline rates is at issue. One such case, *Transwestern Pipeline Company* v. *FERC*, is before the U.S. Court of Appeals for the Fifth Circuit at Docket No. 84-4753. Two others, *Algonquin Gas Company*, 31 FERC ¶61,221 (1985), and *Tennessee Gas Pipeline Company*, 32 FERC ¶61,086 (1985) are pending in proceedings before the Commission.

record and arbitrary conclusions, upheld the Commission's determination that the recovery of Natural's abandoned project costs should be treated differently than similar costs the Commission allows utilities to recover.

The Commission and the Court of Appeals erroneously distinguished the recovery of Natural's abandoned project costs from the allowed recovery of abandoned gas storage projects, abandoned nuclear power plants and dry well costs. While conceding that the Commission has allowed the recovery of the costs of abandoned gas storage projects, the Court of Appeals erroneously and without any support in the record asserted that storage is a necessity for pipelines and that storage projects are necessary for maintaining the equipment of a pipeline. 765 F. 2d at 1165; App. 28a. The Court of Appeals concluded on the basis of such arbitrary assertion, that Natural's abandoned projects were more akin to production activity and therefore distinguishable from storage projects. The plain truth is that storage is simply a means by which some gas pipelines attempt to enhance their gas supply availability and it has nothing to do with maintaining pipeline equipment. In fact, abandoned storage projects are fundamentally indistinguishable from Natural's abandoned gas supply projects. Both failed storage projects and Natural's failed projects are subject to the same standard of review under the Act. Being indistinguishable, they should be treated by the Commission in the same fashion. The Court of Appeal's decision is thus based upon a misapprehension of the evidence and is grounds for reversal by this Court. *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981).

With respect to abandoned nuclear projects, evaluated under the Federal Power Act, 16 U.S.C. §§791a-825u, the Court of Appeals' analysis is similarly unavailing. The Court of Appeals ignored the well established principle that comparable provisions of the Federal Power Act and the Natural

Gas Act "are in all material respects substantially identical".[5] *Arkansas Lousiana Gas Company* v. *Hall*, 453 U.S. 571, 577 n.7 (1981); *F.P.C.* v. *Sierra Pacific Power Company*, 350 U.S. 348, 353 (1956). Rather, the Court of Appeals accepted the Commission's spurious reasoning that Natural's abandoned projects were highly speculative with remote and uncertain benefits to ratepayers,[6] as enough to justify different treatment than is accorded abandoned nuclear projects. Even if the Commission's finding concerning benefits to ratepayers were correct, that fact alone does not justify the difference in treatment accorded Natural's abandoned gas supply projects. Abandoned projects by definition, whether storage or nuclear power plants, are failed efforts to provide utility service to ratepayers. If, as is conceded, the recovery of the costs of such efforts is appropriately allowed in the gas storage and nuclear contexts, neither the Court of Appeals nor the Commission has offered any rational reason for treating Natural's abandoned projects differently. Failed nuclear projects and gas storage projects, as well as Natural's abandoned gas supply projects are evaluated under substantially the same statutes. All such projects are fundamentally indistinguishable because they all represent efforts by utilities to supplement their supply to provide service to ratepayers. The same policy considerations that justify recovery by other utilities of similar costs dictate the same result in this case. The Court of Appeals has recognized and approved those considerations in cases involving abandoned nuclear projects. For example, in *NEPCO Municipal Rate Committee* v. *FERC*, 668 F.2d 1327, 1333 (D.C. Cir. 1981), the Court held:

> Because it would be inequitable to place on the utility the entire loss of expenditures prudent when made, FERC allowed recovery thereof over time. At the same time, FERC is charged with a duty to pro-

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5. Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§824d and 824e, are substantially the same as Sections 4(e) and 5(a) of the Act. Sections 205 and 206 are reproduced in App. 4a-6a.

6. See discussion at pp. 20-21, *infra*.

> tect the consumer against unreasonably high rates . . . . FERC here struck a reasonable balance between the interests of investors and ratepayers.

The Court of Appeals offers no reasoned analysis for its departure from the principle that similar issues should be decided consistently under the Federal Power Act and the Natural Gas Act. Indeed, the Court of Appeals simply evaded the issue of the Commission's obligation to make consistent determinations in cases involving substantially similar issues by dismissing the issue in a conclusory fashion as involving "complex policy questions" and being "complicated" and "most involved". 765 F.2d at 1167-68; App. 34a. The Court of Appeals should have required the Commission to accord Natural's failed projects the same treatment as failed gas storage and nuclear power projects.

2. The Court of Appeals Erred by Disregarding the Pipeline Interest In Affirming the Commission's Determination That the Cost of the Abandoned Gas Supply Projects Must Be Borne Entirely by the Pipeline and Its Shareholders.

It is well settled that in establishing just and reasonable rates, the Commission must not only meet the objective of protecting the interests of consumers, but must also promote the financial well being of gas pipelines by ensuring the maintenance of revenues sufficient to recover operating expenses and capital costs, as well as revenues sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. *F.P.C.* v. *Hope Natural Gas Co*, 320 U.S. 591, 603 (1944) (*Hope*); *F.P.C.* v. *Memphis Light, Gas and Water Division, et al.*, 411 U.S. 458, 465-66 (1973) (*Memphis*). Thus, in its determination of pipeline rates, the Commission must not only give weight to ratepayer or consumer interests, but also the financial health of the pipeline. This Court has reversed decisions where a rate determination was reflective of the protection of only one of

those interests. In *Memphis*, 411 U.S. at 474, this Court noted that under the criteria established in the *Hope* case:

> rates are 'just and reasonable' only if consumer interests are protected and if the financial health of the pipeline in our economic system remains strong.

The present case presents a similar circumstance to the one addressed in *Memphis*.

In this case, the Commission and the Court of Appeals found that it was a proper exercise of the Commission's discretion for it to determine that the pipeline, and thereby its shareholders, must bear the full risk of abandoned project costs, even when such costs have been prudently incurred. Such a determination reflects only the interests of consumers and reflects no consideration for the financial consequences to the pipeline shareholders.

On the other hand, to allow the pipeline to recover abandoned project costs by amortizing and including unamortized amounts in rate base would permit the pipeline to fully recover all such costs and could be characterized as reflective solely of the interests of the company. Only a determination which gives weight to both pipeline and consumer interests, such as Natural's proposal to amortize costs over a five year period, would comport with the standard enunciated in *Hope* and *Memphis*. In upholding the Commission's disregard for pipeline financial consequences, the Court of Appeals appears to have sought to mitigate the error at one point in the opinion by suggesting that some vague concept of "entreprenurial risk" is a necessary component of a pipeline's rate of return. 765 F.2d at 1167, n. 15; App. 33a. The concept, however, is an arbitrary assumption of the Court of Appeals unsupported by any evidence in the record of the case. Such an unsubstantiated assumption should have no bearing on the resolution of this case. In any event, the "entreprenurial risk" assertion is the only reference in the Court of Appeals decision which alludes to any consideration of the financial consequences of disallowance to the pipeline. Thus, the Court

of Appeals appears to have acquiesced to the Commission view that the interests of ratepayers is paramount in a determination of abandoned project cost risk allocation. The Court of Appeals' affirmance that ratepayer interests are paramount is an abdication of its obligation to review Commission decisions with a view to *Hope* criteria. *Cf. Jersey Central Power & Light Company* v. *FERC*, 768 F.2d 1500 (1985).

3. The Court of Appeals Erred in Affirming the Commission's Determination that the Abandoned Project Costs Should Be Disallowed Because the Projects Did Not Benefit Ratepayers.

To withstand judicial review, Commission determinations must be supported by substantial evidence and there must be a rational connection between the facts found and the choice made. *Burlington Trunk Lines* v. *U.S.*, 371 U.S. 156, 168 (1962). In this case, the Court of Appeals failed to apply that standard of review in upholding the Commission's decisions. The Court of Appeals held that the Commission's determination that the public interest in seeing that ratepayers do not pay for services not received is dispositive. 765 F.2d at 1164; App. 27a. The basis for the Court's decision appears to be the Commission's finding that the abandoned project costs were highly speculative and any benefit to consumers was remote and uncertain. Such a finding, however, is completely unsupported by the record in this case. The record is uncontroverted and the ALJ specifically found in the *Initial Decision* that all three projects were planned, or were the preliminary to plans, to enhance the gas supply available to Natural's customers and that the need for the gas could hardly be questioned. *Initial Decision*, 9 FERC at p. 65,225; App. 66a. Such facts, considered against the backdrop of the severe gas shortage in existence when the projects were commenced, in no way leads to the conclusion that the projects would not benefit ratepayers. For the Commission to conclude that the projects "were and would not likely be of benefit to consumers" is to totally ignore the record. The Court of Appeal's affirmance of such a conclusion is a gross misappli-

cation of the requirement that Commission decisions be based on substantial evidence. *See Mobil Oil Corp.* v. *F.P.C.* 417 U.S. 283, 327 (1974).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

NATURAL GAS PIPELINE
COMPANY OF AMERICA

Paul E. Goldstein
Attorney for Petitioner
Natural Gas Pipeline
Company of America

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Paul E. Goldstein, Esq.*
Paul W. Mallory, Esq.
Emmitt C. House, Esq.
701 East 22nd Street
Lombard, Illinois 60148
(312) 691-2731

Attorneys for Natural Gas Pipeline Company of America

Joseph M. Wells, Esq.
Of Counsel

*Counsel of Record